IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NAVIN BAROT,	:	
Plaintiff	:	
	:	Civil Action No:
V.	:	4:14-cv-00673-MWB
SUSQUEHANNA PHYSICIAN SERVICES D/B/A SUSQUEHANNA HEALTH MEDICAL GROUP, DIVINE PROVIDENCE HOSPITAL OF THE SISTERS OF CHRISTIAN CHARITY, SUSQUEHANNA HEALTH SYSTEM, and SUSQUEHANNA PHYSICIAN SERVICES,	:	Honorable Matthew W. Brann
	:	*Electronically Filed*
Defendants	:	

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1, Plaintiff Navin Barot hereby submits the following Statement of Undisputed Material Facts:

1. At all times relevant and material to Plaintiff's claims, Plaintiff Navin Barot was a physician licensed to practice medicine in the Commonwealth of Pennsylvania, specializing in Gastroenterology. (Doc. 1, Compl. ¶5; Doc. 8, Ans. ¶5)

2. Defendant Susquehanna Health System ("SHS") is a Pennsylvania corporation maintaining a registered office in Williamsport, Pennsylvania. (Compl. ¶10, Ans. ¶10)

3. SHS is a four-hospital integrated health system in north-central Pennsylvania including Divine Providence, Muncy Valley Hospital, Soldiers + Sailors Memorial Hospital and Williamsport Regional Medical Center. (Compl. ¶11, Ans. ¶11)

4. Defendant Susquehanna Physician Services d/b/a Susquehanna Health Medical Group ("SHMG") is a Pennsylvania non-profit corporation maintaining a registered office address in Williamsport, Pennsylvania. (Compl. ¶6, Ans. ¶6)

5. SHMG is a 501(c)(3) corporation. (Ex. A, Johnson Dep. 1[1], 9:5 – 15)

6. SHMG employs the physicians of SHS and is a subsidiary of SHS. (Ex. A, 7:18 – 8:6)

7. SHS is the sole member of SHMG. (Compl. ¶12, Ans. ¶12)

8. Defendant Divine Providence Hospital of the Sisters of Christian Charity ("Divine Providence") is a Pennsylvania non-profit corporation maintaining a registered office address in Williamsport, Pennsylvania. (Compl. ¶8, Ans. ¶8)

9. Jim Turri was Senior Vice President and Chief Operating Officer of SHMG from approximately 2000 until January 2013. (Ex. B, Turri Dep.[2], 6:5 – 8, 7:7 – 9, 7:22 - 8:3)

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[1] "Johnson Dep. 1" refers to the transcript from the deposition of Steven Johnson taken on June 24, 2015. True and correct copies of relevant excerpts from the deposition of Steven Johnson are appended as Exhibit "A" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[2] "Turri Dep." refers to the transcript from the deposition of Jim Turri taken on June 24, 2015. True and correct copies of relevant excerpts from the deposition of Jim Turri are appended as Exhibit "B" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

10. As Chief Operating Officer, Mr. Turri was responsible for physician recruitment and retention, and was involved in the process of bringing Plaintiff to SHMG. (Ex. B, 8:14-25, 10:2 - 4)

11. Mr. Turri was involved directly in the contract negotiations for Plaintiff's Employment Agreement. (Ex. B, 16:2 – 7, 19:21 – 20:3)

12. Mr. Turri testified that Plaintiff's contract negotiations were rigorous, and it was a difficult process with many changes and a lot of steps to go through, many of which Mr. Turri did not have the individual authority to make. The changes Plaintiff asked for were not typical, nor had they ever been done for other physicians to that point. (Ex. B, 37:2 – 38:2)

13. During Dr. Barot's contract negotiations, the topics of RVU's and incentive compensation were important to Dr. Barot. (Ex. B, 30:6 – 13)

14. Kenneth Young has been vice president of legal services; general counsel and chief legal officer for SHS since the end of 2005. (Ex. C, Young Dep.[3], 4:21 – 5:7)

15. Mr. Young provides legal advice and services for SHS and all wholly-owned subsidiaries and its employees. (Ex. C, 6:12 – 19)

16. In the negotiation of Plaintiff's Employment Agreement, Mr. Young testified that compensation was the most significant issue. (Ex. C, 28:3 – 15)

[3] "Young Dep." refers to the transcript from the deposition of Kenneth Young taken on August 4, 2015. True and correct copies of relevant excerpts from the deposition of Kenneth Young are appended as Exhibit "C" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

17. On March 25, 2009, Mr. Turri sent an email with attachment to Dr. Barot, which are Bates stamped D-64 through D-72. (Ex. B, 24:19 – 25:11; Ex. D, Emails 1[4], D-64 through D-72)

18. In a written employment proposal from Mr. Turri to Dr. Barot dated March 25, 2009, Mr. Turri proposed a "Limitation on Compensation," which was described as being "not negotiable," which limited the amount of Dr. Barot's Base Salary plus Additional Compensation payable by SHMG to not exceed the 90th percentile of the most recently available Compensation Survey published by the Medical Group Management Association for physicians in the same specialty as Dr. Barot. (Ex. D, D-65 through D-66)

19. Notwithstanding the "Limitation on Compensation" in Mr. Turri's letter of March 25, 2009, as a result of negotiations between SHMG and Dr. Barot, Dr. Barot's employment agreement, which was signed on May 18, 2009 and effective July 27, 2009, did allow for compensation above the 90th percentile of the most recently available Compensation Survey published by the Medical Group Management Association for physicians in the same specialty upon presentation to the Compensation Committee of the SHMG Board of Directors. (Ex. B, 25:12 – 27:12; Ex. E, Employment Agreement[5], Docs. D-4 through D-5, *see* Section 7, Limitation on Compensation.)

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[4] "Emails 1" refers to written email documentation, Bates stamped D-64 through D-72, true and correct copies of which are appended as Exhibit "D" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[5] "Employment Agreement" refers to Plaintiff's Employment Agreement, Bates stamped D-1 through D-15, true and correct copies of which are appended as Exhibit "E" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

20. Dr. William McCauley was president of SHMG from September 2008 until February 2015. (Ex. F, McCauley Dep.[6], 6:23 – 7:6)

21. At the time of Plaintiff's hire at SHMG, Mr. Turri reported to Dr. McCauley, and Dr. McCauley reported to Steve Johnson. (Ex. B, 9:3 – 19)

22. On March 25, 2009, Dr. McCulley sent an email to Mr. Turri, regarding Dr. Barot's contract negotiations, and stating that, "I have concerns about the $/RVU as we discussed, but you told me that he is fixated on that number for us to get him here. I hope he can help us land Dr. Babamento also." Mr. Turri agrees that he told Dr. McCulley that Dr. Barot was fixed on the $/RVU number. (Ex. G, Emails 2[7], D-62; Ex. B, 31:24 – 33:10)

23. On April 1, 2009, Mr. Turris sent an email to Dr. Barot stating:

> "I just got finished going through a long process here of completing our Employment offer to you. I must say that I did get in a bit of trouble trying to do some things out of the ordinary, but all in all, I do feel very good about what we can do for you. . . . What I have attached has been very closely scrutinized but approved by all the necessary powers here, so I hope you appreciate it! Now remember, if your productivity does exceed the 90th percentile, we only have to go to our Physician Compensation Committee for their approval to pay above that level, which if you are doing the work will not be a problem. Also, please notice that Committee DIRECTED me to set the WRVU target to match the 75th percentile salary target, therefore the target had to be set at 10,000, which as you can see from the attached MGMA charge I was able to set it lower than their target which is 11,675."

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[6] "McCauley Dep." refers to the transcript from the deposition of William C. McCauley, M.D. taken on August 5, 2015. True and correct copies of relevant excerpts from the deposition of William McCauley, M.D. are appended as Exhibit "F" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[7] "Emails 2" refers to written email documentation, Bates stamped D-62, a true and correct copy of which is appended as Exhibit "G" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

(Ex. H, Emails 3[8], BAROT 527 through BAROT 529; Ex. B, 35:14 – 36:1)

24. On April 2, 2009, Mr. Turri sent an email to Dr. Barot stating that,

> This is not designed to be misleading, just to show that if those productivity numbers are obtained we would need to bring this to our compensation committee for approval to pay if it exceeds the most recently published MGMA 90th percentile total cash compensation. Our committee is very fair and understanding in these matters, they just want to make sure we are not paying over the 90th percentile for work being done under that level. We rarely have to go before them because most of our physicians do not hit that level. On the few occasions we did ask for approval, they have granted it with appropriate justification.

(Ex. I, Emails 4[9], D-79 through D-80; Ex. B, 39:8-21)

25. On April 29, 2009, Mr. Turri sent an email to Dr. Barot stating that,

> Most importantly, we cannot pay over the MGMA 90th percentile without RVU productivity justification and our board committee approval. Our legal guys will make sure that is in the contract and as long as you are producing, the committee will approve the payment. We just have to protect the organization and keep the IRS happy.

(Ex. J, Emails 5[10], BAROT 539; Ex. B, 47:10-19)

26. On May 1, 2009, Kenneth B. Young, Esq., Vice President, Legal Services, Susquehanna Health, sent an email to Marc Lovecchio, an attorney representing Plaintiff, stating that:

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[8] "Emails 3" refers to written email documentation, Bates stamped BAROT527 through BAROT529, true and correct copies of which are appended as Exhibit "H" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[9] "Emails 4" refers to written email documentation, Bates stamped D-79 through D-81, true and correct copies of which are appended as Exhibit "I" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[10] "Emails 5" refers to written email documentation, Bates stamped BAROT539 through BAROT541, true and correct copies of which are appended as Exhibit "J" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

> Sounds like Dr. Barot and Jim Turri did a terrific job of working together to reach an agreement. We look forward to Dr. Barot joining our team here. We've revised the 90th percentile cap to no longer be the firm ceiling that applies to our other physicians, although it is subject to some procedural safeguards. I think this is a great compromise that ensures Dr. Barot will be fully compensated for all his work here, while simultaneously protecting our non-profit status.

(Ex. K, Request for Admissions[11], #3)

27. On May 14, 2009, Mr. Turri sent an email to Dr. Barot stating that,

> I went to work on our lawyers, and we have softened the language a bit, which I am pleased with:
>
> LIMITATION ON COMPENSATION
>
> The total amount of Base Salary plus Incentive and Quality Bonus Compensation payable by SHMG to Physician in any year of this Agreement shall not exceed the 90th percentile of the most recently available comparable Compensation Survey published by the Medical Group Management Association for physicians in the same specialty as Physician. If Physician's productivity, expertise and overall job performance suggests that his compensation should exceed the 90th percentile compensation limitation set forth herein, it will be presented to the Compensation Committee of the SHHG Board of Directors for consideration and a determination in accordance with SHMG policy and procedure. However, Physician's total compensation shall not exceed such amount as would constitute reasonable compensation when paid by an organization, such as SHMG, which is a tax-exempt organization under Section 501 (c) (3) of the Code.
>
> Notice we took out the words "in no case". Now we have flexibility for sure and I guarantee you that we are only complying with IRS tax-exempt laws of concern. This only means that once you hit the 90th percentile, we simply present the facts to the Board Compensation committee for their approval. Let's face it, we want you to produce! Please trust me, I will make sure you are treated and paid fairly.

[11] "Request for Admissions" refers to Plaintiff's Request for Admissions, dated July 30, 2014, and Defendants' response thereto, dated October 6, 2014, true and correct copies of which are attached hereto as Exhibit "K".

(Ex. L, Emails 6[12], BAROT 544, Ex. B, 54:14-24)

28. Plaintiff signed a five (5) year Employment Agreement with SHMG. (Compl. ¶20, Ans. ¶20)

29. Plaintiff's Employment Agreement, with Attachment, was effective July 27, 2009, and is represented by documents Bates stamped D-1 through D-15. (Ex. M, Int1[13], #4; Ex. E, D-1 through D-15)

30. Plaintiff signed a contract with SHS to be Medical Director of the Gastroenterology Program for Divine Providence, which is represented by documents Bates stamped D-4960 through D-4964. (Compl. ¶21, Ans. ¶21; Ex. N, Director Agreement,[14] D-4960 through D-4964)

31. The Severance provision in Section 20 of Plaintiff's Employment Agreement was a negotiated provision which was not normally included in SHMG's physician employment agreements. (Ex. B, 45:23 – 46:23)

[12] "Emails 6" refers to written email documentation, Bates stamped BAROT542 through BAROT546, true and correct copies of which are appended as Exhibit "L" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[13] "Int1" refers to Plaintiff's First Set of Interrogatories, dated July 30, 2014, and Defendants' response thereto, dated October 10, 2014, true and correct copies of which are appended as Exhibit "M" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[14] "Director Agreement" refers to Plaintiff's Medical Director Agreement, Bates stamped D-4960 through D-4964, true and correct copies of which are appended as Exhibit "N" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

32. The Severance provision of Plaintiff's Employment Agreement, Section 20, provides for a severance payment equal to Plaintiff's Base Salary for twelve months in the even Plaintiff terminates the Agreement for a material breach by SHMG. (Ex. E, D-12)

33. Plaintiff's Employment Agreement, in Section 19, provides that either SHMG or Plaintiff may terminate the Agreement in the event of a material breach. The Agreement further provides that in the event of a material breach, the non-breaching party shall give the breaching party written notice specifying the default along with notice to terminate within thirty (30) days. The breaching party then has thirty (30) days within which to cure the default. If the default if not cured within that time, the Agreement will terminate. (Ex. E, D-11 through D-12)

34. Plaintiff's Employment Agreement, in Section 4A. provided a base salary in the amount of $500,593 for the first three years of the Agreement. (Ex. E, D-2)

35. Plaintiff's Employment Agreement, in Section 6, provided for an incentive compensation. As stated in the Agreement,

> Plaintiff shall be eligible to participate in an incentive compensation program in the first three years of the Agreement. If Physicians WRVU's at the end of the contract year exceed 10,000 WRVU's, physician shall receive Additional Compensation, subject to the limitations set forth in Section 7 below, in accordance with the following formula:
>
> [(A/B X C) X A] – D Where: A = Actual WRVU worked
> B = 100% target WRVU (10,000)
> C = 100% target $/WRVU ($56.06)
> D = 100% target Salary ($560,593)
>
> Incentive Compensation:

[(Actual WRVU/10,000) X $56.06 x Actual WRVU] - $560,593
(A) (B) (C) (A) (D)

(Ex. E, D-2 through D-3)

36. Plaintiff's Employment Agreement, in Section 7, provided for a limitation on compensation. As stated in the Agreement,

> The total amount of Base Salary plus Incentive and Quality Bonus Compensation payable by SHMG to Physician in any year of this Agreement shall not exceed the 90th percentile of the most recently available comparable Compensation Survey published by the Medical Group Management Association for physicians in the same specialty as Physician. If Physician's productivity, expertise and overall job performance suggests that his compensation should exceed the 90th percentile compensation limitation set forth herein, it will be presented to the Compensation Committee of the SHMG Board of Directors for consideration and a determination in accordance with SHMG **policy** and **procedure**. However, Physician's total compensation shall not exceed such amount as would constitute reasonable compensation when paid by an organization, such as SHMG, which is a tax-exempt organization under Section 501(c)(3) of the Code.

(Emphasis added.) (Ex. E, D-4 through D-5)

37. The terms "policy" and "procedure" as used in Section 7 of the Employment Agreement are not further defined anywhere in the Agreement. (Ex. E, D-1 through D-15)

38. Steven Johnson has been the CEO of SHS since 2005. (Ex. A, 6:7-12, 13:11-13)

39. Mr. Johnson is a member of the Board of Directors of SHS. (Ex. A, 18:17-21)

40. Mr. Johnson signed Plaintiff's Employment Agreement as Chairman of the Board of SHMG. (Ex. A, 23:3-5; Ex. E, D-13)

41. Mr. Johnson testified that the policy and procedure referred to in the Employment Agreement was the "Susquehanna Health Medical Employed Physician Compensation" policy. (Ex. A, 58:25 – 59:7; Ex. O, Compensation Policy[15], D-286 through D-288)

42. The Relative Value Units 2007, represented as document D-15, was attached to Dr. Barot's employment contract as an example of codes and RVU values. The attachment provided a listing of "Gastrointestinal Relative Value Units 2007, (Commonly Used)", dated May 18, 2009. The attachment had columns for "CPT Code", "Description", and "RVU (Work)." The attachment includes CPT Codes 99144 and 99145, related to "Moderate (conscious) sedation," with RVU (Work) values of 1.28 and .52, respectively. (Ex. E, D-15; Ex. B, 61:15 – 62:25)

43. An RVU is the unit that Medicare uses to calculate the reimbursement for a particular CPT code. There are three parts to an RVU. There is a medical malpractice piece, there is a piece associated with physician's work, and then a practice expense piece. Those three pieces added together equal the total RVU which is then multiplied times the current Medicare conversion factor to determine

[15] "Compensation Policy" refers to the Susquehanna Health Medical Employed Physician Compensation, Bates stamped D-286 through D-288, true and correct copies of which are appended as Exhibit "O" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

the reimbursement amount for each CPT code. (Ex. P, Rupert Dep.[16], 14:21 – 15:5; Ex. Q, Floyd Dep.[17], 15:4 – 16)

44. A WRVU is the allocation of the total RVU that is associated with the physicians' work, meaning the complexity and the amount of time that the physician spends in performing a certain procedure. (Ex. Q, 15:17 – 24)

45. The Medicare fee schedule does not provide RVU values associated with the conscious sedation codes, although the codes exist on the fee schedule. (Ex. P, 21:19 – 22:2)

46. Although Medicare does not provide reimbursement for CPT codes 99144 and 99145, other payers would provide reimbursement for those codes. (Ex. Q, 26:15 – 28:14)

47. Michael Rupert has been employed by SHS since 1998 and was the Finance Director / Controller for SHMG from 2004 through at least the date of his deposition in 2015. (Ex. P, 7:18 – 8:25)

48. Mr. Rupert is a fellow in the Healthcare Financial Management Association and a Certified Healthcare Financial Professional. (Ex. P, 10:17-20)

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[16] "Rupert Dep" refers to the transcript from the deposition of Michael Rupert taken on June 25, 2015. True and correct copies of relevant excerpts from the deposition of Michael Rupert are appended as Exhibit "P" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[17] "Floyd Dep." refers to the transcript from the deposition of Jerome Floyd taken on August 6, 2015. True and correct copies of relevant excerpts from the deposition of Jerome Floyd are appended as Exhibit "Q" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

49. Jerome Floyd was employed with SHMG from September 2004 until December 2014. (Ex. Q, 7:6 – 18)

50. From 2008 until leaving SHMG, Mr. Floyd was Director of Payer Contracting, a job in which he negotiated contracts with insurance companies on behalf of SHMG. (Ex. Q, 9:20 – 10:12)

51. Mr. Rupert was asked by Mr. Turri if he could find an RVU value for codes related to conscious sedation, 99144 and 99145. (Ex. P, 20:3 – 21)

52. Mr. Rupert spoke with Jerome Floyd to obtain RVU values for the conscious sedation codes. (Ex. P, 24:16 – 25)

53. Mr. Floyd added the values of 1.28 and .52 for the conscious sedation codes 99144 and 99145, respectively, to the chart on page D-15. (Ex. P, 29:2 – 30:13; Ex. E, D-15)

54. During GI procedures, conscious sedation is documented by nurses in the nurse's notes for the procedure, which has a section with a medication record. The nurse indicates exactly what time the sedation was given. (Ex. R, Beucler Dep.[18], 61:12 – 62:8)

55. Lori Beucler was in management at SHS from 2009 through 2015. (Ex. R, 39:3 – 6)

56. Plaintiff's colonoscopies and esophageal scopes all required conscious sedation, which Plaintiff personally performed. The sedation typically lasted about one hour, and in all cases exceeded fifteen minutes. (Ex. S, Barot Decl.[19], #7, 8)

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[18] "Beucler Dep" refers to the transcript from the deposition of Lori Beucler taken on June 23, 2015. Ms. Beucler was in management at SHS from 2009 through 2015 (*See* Paragraph 55 of Statement of Facts). True and correct copies of relevant excerpts from the deposition of Lori Beucler are appended as Exhibit "R" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

57. All providers were billed a single price by SHS and its subsidiaries for the same procedure, and it would be up to the payer to decide what they were going to pay. (Ex. Q, 33:18 – 25)

58. Each month Mr. Rupert ran reports out of the billing system showing by CPT code what was billed by the provider. Mr. Rupert then took that information and dropped it into an Excel spreadsheet that calculated the RVUs for each CPT code based on the number of instances that CPT code was billed for that particular month. (Ex. P, 40:20 – 41:4)

59. Mr. Rupert used an Excel spreadsheet to calculate the compensation due to physicians based upon their contract formula. (Ex. P, 43:3 – 20)

60. Mr. Rupert manually added the RVU values for conscious sedation to Plaintiff's contract to his spreadsheet because they were not on the Medicare fee schedule and those codes were never billed. (Ex. P, 43:21 – 44:14)

61. Of the two conscious sedation codes, Mr. Rupert only added the RVU value for CPT code 99144 to his spreadsheet because that is the code that would be billed for any of Plaintiff's procedures. Code 99145 was not added because it would only be used for those procedures requiring additional time and Mr. Rupert did not have any way of knowing which procedures required additional time. (Ex. P, 47:1 – 11)

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[19] "Barot Decl." refers to the Declaration of Navin Barot, MD, which is appended as Exhibit "S" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

62. Plaintiff was never advised by Defendants that he was not properly billing any particular procedure, or that he was not providing enough information to calculate the 99145 code. (Ex. P, 56:15 – 57:1; Ex. T, Buttorff Dep.[20], 76:2 - 10)

63. Brian Buttorff was administrative director of the specialty surgical services at SHMG while Plaintiff was employed with SHMG. (Ex. T, 7:11 – 23)

64. On December 10, 2009, Mr. Turri sent an email to Brian Buttorff and Dr. McCauley which started out by stating, "Just to F/U on Dr. Barot and his earning potential so no one has a stroke!" (Ex. U, Emails 7[21], D-5680; Ex. B, 71:20 – 72:15)

65. In a Practice Review on April 13, 2010, Mr. Turri discussed that the medical group was working with a consultant firm to develop a standardized way to fairly compensate physicians. Mr. Turri testified that SHMG was trying to develop a more consistent standardized way for all physicians to be compensated because there were a number of different ways SHMG did it and it was confusing and sometimes caused extra work. However, such a plan would not have had any effect on Dr. Barot's

[20] "Buttorff Dep." refers to the transcript from the deposition of Brian Buttorff taken on August 4, 2015. True and correct copies of relevant excerpts from the deposition of Brian Buttorff are appended as Exhibit "T" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[21] "Emails 7" refers to written email documentation, Bates stamped D-5680, a true and correct copy of which is appended as Exhibit "U" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

contract because Dr. Barot's contract was "signed and sealed." (Ex. V, Practice Review[22], D-312; Ex. B, 81:14 – 82:10)

66. In a Practice Review on April 13, 2010, Mr. Turri stated that there could potentially present an issue regarding the compensation Dr. Barot receives for conscious sedation because there is no reimbursement to the medical group from insurance payers for this service. In that review, Dr. Barot's RVU total for March 2010 was reported at 1,514 which included credit for conscious sedation under code 99144. (Ex. V, D-312 through D-313)

67. On June 7, 2010, Dr. McCauley sent an email to Brian Buttorff, Mr. Turri and Mike Rupert asking, "Why are you doing calculations with and without conscious sedation? What is the contractual agreement?" Mr. Turri responded on June 7, 2010, stating, "I told them to do this because he gets RVU's but we don't get reimbursed for it. The contract does not specifically address it one way or another so I wanted to see the difference." (Ex. W, Emails 8[23], D-193 through D-194; Ex. B, 92:13 – 23)

68. Plaintiff's Agreement is "payor blind," meaning that RVU calculations and the issue of payment rates, whether they are Medicare or a third-party insurance rate or private payors, are two different things. (Ex. A, 82:23 – 83:8)

[22] "Practice Review" refers to written minutes from a Practice Review dated April 13, 2010, Bates stamped D-312 through D-313, true and correct copies of which are appended as Exhibit "V" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[23] "Emails 8" refers to written email documentation, Bates stamped D-193 through D-194, true and correct copies of which are appended as Exhibit "W" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

69. On December 8, 2010, Kenneth Young sent an email to Mr. Turri stating that when employed physician compensation is based on a "RVU" model, "we [SHMG] 'count' the RVU's worked and documented, rather than cash received." Mr. Young goes on to say that "for an RVU to be 'counted', it must be for a service reimbursable under Medicare." (Ex. X, Committee Minutes 2[24], D-53 through D-54; Ex. B, 104:2 – 12)

70. Dr. McCauley stated that if Plaintiff met the definition of the CPT code for the conscious sedation procedures, SHMG would have honored those codes and given him RVU credit. (Ex. F, 57:9 – 58:4; 66:17- 68:24)

71. Dr. McCauley testified that when Plaintiff performed conscious sedation as part of another code such as a colonoscopy, which is CPT code 45378, conscious sedation is already included in the RVU score for that procedure, so Plaintiff's claim for RVU's for conscious sedation, 99144, did not meet the definition of that CPT code. (Ex. F, 59:16 – 60:5)

72. Dr. McCauley is not aware of any situations where Dr. Barot would receive WRVU credit for the moderate conscious sedation codes which SHMG provided WRVU values for in the attachment to his contract. (Ex. F, 60:6 – 9)

73. Dr. McCauley never discussed with Plaintiff prior to his contract coming into effect that Dr. McCauley did not believe Plaintiff would ever perform the CPT codes and receive WRVU

[24] "Committee Minutes 2" refers to written minutes of the Compensation Committee Meeting of May 12, 2011, Bates stamped D-49 through D-60, true and correct copies of which are appended as Exhibit "X" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

credit for the moderate conscious sedation codes which SHMG provided WRVU values for in the attachment to his contract. (Ex. F, 61:3 – 9)

74. Dr. McCauley testified that even if Plaintiff had documented the start and stop times perfectly for the moderate conscious sedation he performed, Plaintiff would not have received WRVU credit for the sedation. (Ex. F, 63:20 – 64:9)

75. Mr. Johnson is on the Physician Compensation Committee of SHMG which would have reviewed and discussed Dr. Barot's Employment Agreement. (Ex. A, 23:18 – 24:6)

76. The "Susquehanna Health Medical Employed Physician Compensation" policy is the only document that would have controlled the performance or operation of the Physician Compensation Committee, and is the only document one could refer to if looking to see the policies, procedures or anything like that of the Physician Compensation Committee. The stated policy is that SHMG shall comply with the provisions of applicable law, including but not limited to 42 U.S.C. §1320 et seq. (the "Anti-Kickback Statute"), 42 U.S.C. §1395 et seq. (the "Stark Regulations") and §53.4958 of the Internal Revenue Code (the "Intermediate Sanction Regulations") (Ex. Y, Johnson Dep. 2[25], 5:19 – 6:19; Ex. O, D-286 through D-288)

[25] "Johnson Dep. 2" refers to the transcript from the deposition of Steven Johnson taken on June 30, 2016, which was the conclusion of the deposition started on June 24, 2016. True and correct copies of relevant excerpts from the deposition of Steven Johnson are appended as Exhibit "Y" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

77. Other than the Susquehanna Health Medical Group Employed Physician Compensation policy, there were no other written policies that the Compensation Committee relied upon when reviewing physician compensation. (Ex. Z, Gage Dep.[26], 17:5 – 18:9; Ex. O, D-286 through D-288)

78. Timothy Gage was Chairman of the Physician Compensation Committee of SHMG when Plaintiff's compensation was reviewed. (Ex. Z, 9:6 – 11, 10:8 - 11)

79. No documentation or communications exists related to training or instruction provided to the Physician Compensation Committee with respect to 42 U.S.C. §1320 et seq. (the "Anti-Kickback Statute"), 42 U.S.C. §1395 et seq. (the "Stark Regulations") and §53.4958 of the Internal Revenue Code (the "Intermediate Sanction Regulations") at any time during or prior to Plaintiff's employment with Defendants. (Ex. AA, RPD4[27], #1)

80. For the first contract year of his Employment Agreement, without needing to go before the Compensation Committee, Plaintiff was paid his base salary of $560,593, plus an incentive of $216,747, for a total of $777,340, which equated to the 90th percentile of the most recently available

[26] "Gage Dep." refers to the transcript from the deposition of Timothy Gage taken on June 29, 2016. Timothy Gage was Chairman of the Physician Compensation Committee of SHMG when Plaintiff's compensation was reviewed. (*See* Paragraph 78 of Statement of Facts) True and correct copies of relevant excerpts from the deposition of Timothy Gage are appended as Exhibit "Z" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[27] RPD4 refers to Plaintiff's Fourth Request for Production of Documents, dated July 14, 2016, and Defendants' response thereto, dated August 15, 2016, true and correct copies of which are attached as Exhibit "AA" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

Medical Group Management Association for physicians in the same specialty as Physician. (Ex. AB, Committee Minutes 1[28], Doc. D-22)

81. On March 10, 2011, the Compensation Committee held a meeting at which an additional compensation request for Dr. Barot in the amount of $160,560 above the 90th percentile was presented by Mr. Turri. (Ex. AB, D-20 through D-25; Ex. B, 108:17 – 112:14)

82. The additional compensation request for Plaintiff at the March 10, 2011, meeting did not include credits for WRVU's for moderate (conscious) sedation codes 99144 and 99145. (Ex. AB, D-20 through D-25)

83. Dr. Barot never agreed that $160,560 was the amount of additional compensation due to him at the March 10, 2011 Compensation Committee meeting. (Ex. F, 81:12 – 82:15; Ex. B, 108:25 – 109:11)

84. At the meeting of March 10, 2011, the Compensation Committee was never advised that Plaintiff sought compensation above the $160,560 which was presented by Mr. Turri. (Ex. AB, D-20 through D-25)

85. At the meeting of March 10, 2011, the Compensation Committee unanimously approved Plaintiff to receive the entire $160,560 in Incentive Compensation which was presented by Mr. Turri. (Ex. AB, D-20 through D-24)

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[28] "Committee Minutes 1" refers to written minutes of the Compensation Committee Meeting of March 10, 2011, Bates stamped D-20 through D-25, true and correct copies of which are appended as Exhibit "AB" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

86. On May 12, 2011, the Compensation Committee held a meeting at which an additional compensation request for Dr. Barot based upon the conscious sedation code 99144 was presented by Mr. Turri. The calculations of Plaintiff's potential additional income were derived using the WRVU value of 1.28 for CPT code 99144. According to the minutes of the meeting, if Plaintiff received additional sedation (IVCS) for all procedures performed from August 2009 through July 2010, he would receive 1,950 WRVU's, but if credit were only given for IVSC that was documented on the billing forms, Plaintiff would receive 1,378 WRVU's. (Ex. X, D-49 through D-60; Ex. B, 117:1 – 7, 131:21 – 132:15)

87. The Physician Compensation Committee has the discretion to approve part of or make a partial grant of the amount of compensation which is presented to it. (Ex. Y, 34:24 – 35:20)

88. Mr. Johnson testified that there would have been potential ramifications from the IRS if Dr. Barot, or any employee of SHMG, were paid above the MGMA 90th percentile, although he never did any independent research as to why. (Ex. A, 71:19 – 76:9)

89. Mr. Johnson testified that approving even one additional dollar of compensation for Dr. Barot beyond the $160,560 which was approved by the compensation committee would have exceeded the reasonable amount when paid by a tax-exempt organization. Without specific clarification as to why, Mr. Johnson believed payment of one additional dollar of compensation to Dr. Barot would have violated IRS regulations, the Stark Law and the Anti-Kickback law. (Ex. Y, 41:24 – 43:13)

90. The minutes of the Compensation Committee meeting of May 12, 2011 reflect the following:

After a comprehensive review and discussion of Mr. Turri's report, SHMG Employed Physician Compensation Policy and Procedure especially taking into consideration items #4 on page 1 and #7 on page 3, and Dr. Barot's request for additional compensation the Committee reached the following conclusions:

• There have been a number of reported problems and performance issues with Dr. Barot' s practice style including very low patient satisfaction scores and many referring physician complaints. Dr. Barot's work volume trend has been declining as a result.
• This Committee has determined that Dr. Barot's total compensation would exceed fair market value if any additional compensation payments were made which is contrary to the obligation of a non-profit tax-exempt organization.
• According to the document provided by Mr. Turri, paying the additional compensation requested by Dr. Barot would be a ratio at least 1.41 times higher than the MGMA 90th percentile. A ratio of this magnitude is not even reported by the MGMA survey.

Attorney Pepperman made a motion to deny the request by Dr. Barot for additional compensation on the grounds that the physician's productivity and overall performance does not justify paying a ratio that much higher over the 90th percentile of the MGMA compensation survey. In addition this much total compensation would exceed such amount as would constitute reasonable when paid by a tax-exempt organization such as SHMG. Dr. Douthat seconded the motion and it received unanimous approval.

(Emphasis in original) (Ex. X, D-50)

91. There is no written policy which directs the Compensation Committee to consider physician compliance audits as a factor in determining physician compensation. (Ex. AC, Pepperman Dep.[29], 27:16 – 28:2)

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[29] "Pepperman Dep." refers to the transcript from the deposition of Ann Pepperman taken on June 29, 2016. Ann Pepperman is an attorney and was a voting member of the SHMG Physician Compensation Committee that reviewed Plaintiff's request for additional compensation. (*See* Paragraph 94 of Statement of Facts) True and correct copies of relevant excerpts from the deposition of Ann

92. There is no written policy which directs the Compensation Committee to consider physician performance and referrals as a factor in determining physician compensation. (Ex. AC, 28:3 – 28:21)

93. There is no written policy which directs the Compensation Committee to consider a physician's reputation, behavior or staff turnover as a factor in determining physician compensation. (Ex. AC, 28:22 – 29:7; Ex. Z, 32:14 - 18)

94. Ann Pepperman is an attorney and was a voting member of the SHMG Physician Compensation Committee that reviewed Plaintiff's request for additional compensation. (Ex. AC, 3:12-14, 3:25 – 4:6, 10:3-4)

95. The minutes of the Compensation Committee meeting of May 12, 2011 refer to the RVU Value chart including the RVU values for CPT Codes 99144 and 99145 as an "attachment" to Plaintiff's Employment Agreement. (Ex. X, D-51 (see 2(b), "Dr. Barot feels he should receive credit for all IVCS WRVU's as per the attachment on his contract (see Attachment 1, page 2)") and D-55 through D-56 (Attachment 1))

96. When SHMG prepared RVU Comparisons for Plaintiff for FY2010, the RVU Value used for code 99144, Moderate (conscious) sedation, was 1.28. (Ex. AD, RVU Comparison[30], D-255)

Pepperman are appended as Exhibit "AC" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[30] "RVU Comparison" refers to a financial report, Bates stamped D-255, a true and correct copy of which is appended as Exhibit "AD" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

97. Michael D. Miscoe JD, CPC, CASCC, CUC, CCPC, CPCO, CPMA is a nationally recognized expert in the field of forensic CPT, HCPCS and ICD coding, billing, reimbursement, auditing and compliance. Mr. Miscoe has substantial experience in the forensic analysis of the coding, billing and reimbursement of physician services to both commercial and government payers. Mr. Miscoe has developed educational curricula on behalf of AAPC as well as authored educational curricula and specialty certification examinations in the areas of coding, auditing and compliance, and has performed expert analysis of these issues in a variety of administrative and civil proceedings. (Ex. AE, Miscoe Report[31], appended Curriculum Vitae)

98. Mr. Miscoe has prepared an expert report analyzing the arguments SHMG has raised as to why Plaintiff did not "work" the conscious sedation codes and/or should not receive WRVU credit for them. (Ex. AE)

99. At no time did Plaintiff have any family members employed by or affiliated with any of the Defendants' organizations. (Ex. S, #2)

100. At no time did Plaintiff hold a voting membership in any of the defendant organizations or their governing bodies. (Ex. S, #3)

101. At no time did Plaintiff hold the position of president, chief executive officer, chief operating officer, treasurer or chief financial officer in any of the defendant organizations. (Ex. S, #4)

[31] "Miscoe Report" refers to the expert report prepared by Michael D. Miscoe, JD, CPC, CASCC, CUC, CCPC, CPCO, CPMA, a true and correct copy of which is appended as Exhibit "AE" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

102. At no time while employed by defendants did Plaintiff possess a material financial interest in a provider-sponsored organization. (Ex. S, #5)

103. As a physician and Medical Director, Plaintiff was not in management and was not an officer of SHMG. (Ex. R, 71:22 – 72:14)

104. Plaintiff could not obligate the organization for the purchase of equipment. (Ex. F, 35:19 – 24)

105. Plaintiff is not the founder of any of the defendant organizations. (Ex. S, #6)

106. As Medical Director, Plaintiff's responsibilities included the following:

> **2. PHYSICIAN RESPONSIBILITIES**
>
> C. Contributes to the growth of Gastroenterology/Endoscopy Services through active participation in community education and awareness initiatives targeted to both lay and professional audiences. Management Representatives and Physician will jointly identify opportunities for community education and awareness initiatives.
>
> E. Collaborates with SH management to establish programs and services consistent with the mission, vision, values, and goals of SH, including its managed care initiatives.
>
> G. Supports SH management in its programs and operation, including, without limitation, assisting SH in its efforts to ensure that the hematology services are efficiently and effectively provided and that the quality of such services is consistent with SH's commitment to the provision of quality health care.
>
> H. Recommends the development and participates with Management Representatives in periodic review and revision as appropriate of policies, procedures, and protocols relevant and appropriate for all areas of the Physician's scope of responsibility under this Agreement.

J. Collaborates with SH management in assuring full compliance with regulations of the Pennsylvania Department of Health, the Standards of the Joint Commission on Accreditation of Healthcare Organizations, Centers for Medicare & Medicaid Services, and other regulatory agencies deemed necessary SH.

K. Actively, appropriately. and professionally collaborates with SH Management the reso1ution of problems and in evaluation of and response to complaints from patients, staff, physicians or others pertaining to Gastroenterology/Endoscopy Services.

O. Work with administration towards establishing and maintaining top-performing Gastroenterology/Endoscopy Services.

(Ex. N, D-4960 through D-4962)

107. Mr. Johnson received a letter from Christian Lovecchio, Dr. Barot's attorney, dated April 15, 2011, indicating that there was 30 days' notice of a breach of contract along with 30 days' notice of termination. In the letter, the following breach was noticed, among others:

> Pursuant to paragraphs 6 and 7 of the Agreement, SH provided Dr. Barot an incentive compensation plan in which Dr. Barot was eligible to participate in the first three years of the agreement. Specifically, if Dr. Barot's RVUs at the end of the contract year exceeded 10,000 RVUs, the physician shall receive additional compensation subject to the limitation set forth in section 7. Utilizing your company's formula, and based on Dr. Barot's RVUs at the end of the contract year (July 09 to July 2010), Dr. Barot's RVUs should include the moderate conscious sedation amounts under the CPT codes 99144 and 99145. However, sometime on or about December 9, 2010, Dr. Barot received an email from Jim Turri attaching Attorney Ken Young's opinion indicating that "for an RVU to be counted' it must be for a service reimbursable by Medicare". Specifically, Attorney Young indicated that the RVUs for moderate conscious sedation (CPT codes 99144 or 99145) would not be reimbursable and would be bundled into a billable code. As a result and in breach of the Agreement, SH decided to no longer apply those RVUs. Accordingly, I believe based on the Agreement, SH has breached sections 6 and 7 as a result of SH's decision to no longer include RVUs for CPT codes 99144 or 99145.

(Compl. ¶34; Ans. ¶34; Ex. Y, 35:21 – 36:15, 37:22 – 38:5; Ex. AF, Term Letter[32], BAROT 551 – BAROT 553)

108. Plaintiff's employment with Memorial Hospital in Gulfport, Mississippi, which is evidenced by a contract dated May 15, 2011, began after his employment with SHGM in Williamsport, Pennsylvania ended. (Ex. AG, Barot Dep.[33], 180:3 – 181:10; Ex. AH, Memorial Contract[34], Doc. MHG00004, MHG00022 (redacted due to confidentiality))

109. If SHMG had cured the breach of contract following notice from Plaintiff's attorney, Plaintiff would have remained at SHMG. (Ex. AG, 234:21 – 235:5)

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[32] "Term Letter" refers to a letter to Steven Johnson, Bates stamped BAROT551 through BAROT553, true and correct copies of which are appended as Exhibit "AF" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[33] "Barot Dep." refers to the transcript from the deposition of Navin Barot, M.D. taken on June 22 and 23, 2015. True and correct copies of relevant excerpts from the deposition of Navin Barot, M.D. are appended as Exhibit "AG" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

[34] "Memorial Contract" refers to a letter to Plaintiff's Employment Agreement with Memorial Hospital in Gulfport, Bates stamped MHG00004 and MHG000022, redacted due to confidentiality, true and correct copies of which are appended as Exhibit "AH" to the Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment submitted and filed herewith.

Respectfully submitted,

McCarthy Weisberg Cummings, P.C.

January 31, 2017
Date

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CERTIFICATE OF SERVICE

I, Larry A. Weisberg, Esquire, hereby certify that the foregoing **Statement of Undisputed Material Facts** has been filed electronically and is available for viewing and downloading through the Court's Electronic Case Filing (ECF) System, constituting service to all attorneys of record in this matter.

McCarthy Weisberg Cummings, P.C.

January 31, 2017
Date

/s/ Larry A. Weisberg

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